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No. 88-1668

In the Supreme Court of the United States

ROBERT D. ALEXANDER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Hatch Political Activity Act (Hatch Act), 5 U.S.C. 1501-1508, 7321-7326 (1994 & Supp. III 1997), violates the equal protection component of the Due Process Clause of the Fifth Amendment by providing different penalties for covered state and federal employees who engage in activity prohibited by the Act.

2. Whether the Hatch Act violates the due process guarantee of the Fifth Amendment by barring covered state employees, who work in federally financed state programs, from being candidates in a partisan election, although state law would otherwise permit them to run for office while in an unpaid leave of absence.

3. Whether the district court erred by granting the Merit Systems Protection Board's motion to affirm its final decision, after reviewing the decision not under the proper statutory standard of review.

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In the Supreme Court of the United States

No. 98-1662

ROBERT D. ALEXANDER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 165 F.3d 474. The opinion of the district court (Pet. App. A21-A34) is unreported. The opinion of the Merit Systems Protection Board (Pet. App. A35-A44) is reported at 71 M.S.P.B. 636.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1999. The petition for a writ of certiorari was filed on April 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Hatch Political Activity Act (Hatch Act), 5 U.S.C. 1501-1508, 7321-7326 (1994 & Supp. III 1997), prohibits covered state and federal employees from being candidates for elective office. 5 U.S.C. 1502(a)(3). A state employee is generally covered by the Act if the employee's "principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4). Because state Medicaid programs are funded in large part by federal grants, see 42 U.S.C. Subchapter XIX ("Grants to States for Medical Assistance Programs"); 42 C.F.R. 430.30(a)(1), state employees whose "principal employment is in connection with" a state Medicaid program are covered by the Hatch Act.

The Merit Systems Protection Board (MSPB or Board) is responsible for enforcing the Act. When a federal employee violates the Act, the employee must "be removed from his position, and funds appropriated for the position from which [he was] removed thereafter may not be used to pay the employee or individual." 5 U.S.C. 7326. "[I]f the [MSPB] finds by unanimous vote that the violation does not warrant removal," however, "a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board." 5 U.S.C. 7326. If the MSPB determines that a state employee violated the Act and that the violation warrants removal, the state employer must either (1) dismiss the employee and not rehire him for 18 months, or (2) forgo federal funds in an amount equal to two times the employee's annual pay. 5 U.S.C. 1504-1506.

2. Petitioner was employed by the Michigan Department of Social Services (DSS) as an analyst in the Medicaid program. Pet. App. A3. When petitioner learned that the incumbent state representative for his district did not intend to run for re-election, he decided to be a candidate in the 1992 Democratic Party primary for that seat. *Ibid.* Having had prior experience in partisan politics and some familiarity with the Hatch Act, petitioner knew that his candidacy would be unlawful if Medicaid was funded in whole or part by federal loans or grants. *Ibid.* However, because DSS employees referred to the Medicaid funding mechanism as a "reimbursement," petitioner thought that Medicaid might be said to be funded by federal "reimbursement" rather than grants or loans and thus outside the Hatch Act's coverage. *Ibid.*

Petitioner therefore sought information concerning his Hatch Act coverage—and was repeatedly told by everyone he asked that he was covered by the Act. He consulted Ed Kemp, his supervisor; Paul Servais, an employee in DSS's Human Resources office; and Heidi Weintraub, an attorney with the Office of Special Counsel (OSC), the federal agency charged with providing advice about the Hatch Act and prosecuting Hatch Act violations. Pet. App. A3-A4; 5 U.S.C. 1212(f), 1216(a)(2). Kemp told petitioner that he thought his position was covered by the Hatch Act. Pet. App. A3. Servais and Weintraub both told petitioner that he was covered by the Hatch Act and could not run for office. *Id.* at A3-A4. And Weintraub told petitioner unequivocally that he could not run for office even if he were on an unpaid leave of absence, and she sent him a copy of an OSC booklet on the Hatch Act. *Id.* at A4-A5. Petitioner said he did not find Servais' and Weintraub's explanations satisfactory because they

did not provide written verification or legal citations supporting their opinions. *Ibid.* Petitioner concluded that it was uncertain whether the Hatch Act applied to him and decided to "run and take a chance on an unclear situation." *Id.* at A5. At no time was petitioner ever told that he could be a candidate without violating the Hatch Act. *Ibid.*

Petitioner also was of the belief that the Hatch Act's forfeiture provision would not impose a significant penalty if he did violate the Act. In particular, petitioner assumed that DSS would be required to forfeit only twice the amount of salary he actually received during the campaign, an amount he was sure the agency would be willing to forfeit in order to retain his services. Pet. App. A5. Petitioner therefore took an unpaid leave of absence during the campaign as required by Michigan civil service law, and on May 12, 1992, filed his nominating petition to become a candidate. *Ibid.* The next day, he spoke to John Sorbet, a friend and DSS federal funding analyst who had been on vacation, to ask about Medicaid funding. *Ibid.* Sorbet informed petitioner that Medicaid is funded by a federal grant award. *Ibid.* Petitioner continued his candidacy nonetheless. During the campaign, petitioner met with an OSC investigator, who interviewed him and further explained the Hatch Act to him. *Id.* at A6. Petitioner continued his campaign. Petitioner lost the primary election. *Ibid.*

3. In July 1993, the OSC filed a complaint before the MSPB charging petitioner with violating the Hatch Act. Pet. App. A6. The MSPB assigned the case to an administrative law judge (ALJ), who permitted discovery and held a hearing. *Ibid.* The ALJ issued a recommended decision in July 1995, finding that petitioner violated the Hatch Act as charged. *Id.* at A45-A57.

The ALJ recommended that, although petitioner's violation was knowing and willful, petitioner not be removed from his job because OSC failed to take more active measures to dissuade him from violating the Act. *Id.* at A6-A7, A54.

The OSC filed exceptions to the recommendation, and the Board adopted the ALJ's recommended decision in part and rejected it in part. Pet. App. A35-A44. The Board found that petitioner violated the Hatch Act and that his violation warranted removal because it was knowing and willful. *Id.* at A6-A7, A39-A43. Moreover, unlike the ALJ, the Board was "not persuaded by [petitioner's] attempt to place the blame for his knowing violation of the Hatch Act on the failure of others to adequately dissuade him." *Id.* at A43. The Board therefore ordered that DSS could choose either to remove petitioner from his position or to forfeit federal funds in an amount equal to twice petitioner's annual salary. *Id.* at A7, A44. The Board further ordered that the same amount of federal funds would be withheld if petitioner was hired by a Michigan state or local agency within 18 months after his removal. *Ibid.* DSS terminated petitioner's employment in response. *Id.* at A7.[1]

4. Petitioner sought review of the Board's decision in district court pursuant to 5 U.S.C. 1508, Pet. App. A21, A24, and the Board filed a motion to affirm, *id.* at A21. The district court granted the Board's motion to affirm. *Id.* at A21-A34.

The district court concluded that the Board's decision was supported by substantial evidence and that the Board did not abuse its discretion in ordering peti-

[1] The termination did not take effect until January 1998 because petitioner obtained a stay. Pet. App. A7.

tioner's removal. The stipulated facts and petitioner's own admissions, the court explained, provided more than sufficient evidence. Pet. App. A29. As the court noted: "Alexander does not claim to have been unaware of the Hatch Act, and he was advised by authoritative sources that his candidacy would violate the Act. Nonetheless, he persisted in running." *Ibid.*[2]

The district court also rejected petitioner's argument that the Hatch Act violated his right to equal protection under the Constitution by providing different penalties for federal and state employees. First, the court held that petitioner lacked standing to raise an equal protection challenge to the penalty provisions because he was not harmed by the differences he sought to challenge; he therefore would receive no benefit from a ruling that differential punishments are unconstitutional. Pet. App. A32. The district court also rejected the contention that state employees are penalized more harshly than federal employees for Hatch Act violations. *Ibid.* Instead, the court explained, the Hatch Act could easily be read as penalizing federal employees more rigorously than state employees. *Ibid.* Federal employees who violate the Hatch Act must be penalized in some way, the court observed, whereas state em-

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[2] Petitioner also moved for dismissal of the Board's motion to affirm, relying on *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560, 1579 n.29 (10th Cir. 1994), which "specifically disapproved" of the practice of filing motions to affirm in administrative review proceedings. Pet. App. A24 n.5. The court denied the motion, distinguishing *Olenhouse* because the motion at issue in that case invited the reviewing court to rely on evidence outside the administrative record. *Ibid.* The court also noted that the Sixth Circuit had not adopted *Olenhouse* but concluded that, in any event, the case was not applicable where, as here, the agency relies solely on the administrative record. *Ibid.*

ployees whose violations do not warrant removal receive no penalty. Moreover, the Hatch Act permits state agencies to forfeit federal funds rather than impose a removal ordered by the MSPB. *Ibid.* In any event, the court concluded, the differential penalty scheme was not implicated in this case. "Because the Board determined that [petitioner's] violation warranted removal, it could not have imposed any lesser penalty even if [petitioner] had been a federal employee." *Ibid.*[3]

5. Petitioner appealed and the court of appeals affirmed. Pet. App. A1-A20. The court of appeals first rejected petitioner's claim that the district court had erred by deciding the case on summary judgment. *Id.* at A9. Petitioner argued that the Tenth Circuit had disapproved of the use of summary judgment procedures and motions to affirm in appeals from agency decisions under the Administrative Procedure Act in *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560, 1579 n.29 (1994), because such procedures allegedly invite improper consideration of evidence outside the administrative record and reliance upon post hoc rationalizations. The court of appeals, however, determined that *Olenhouse* was inapplicable in this case because the Board's motion relied on the proper standard of review, did not seek to introduce extra-record evidence, and did not rely on post-hoc rationalizations. Pet. App. A9.

The court of appeals also rejected petitioner's claim that the Hatch Act violates the equal protection com-

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[3] Although the Hatch Act does not define when removal is warranted, the Board, in construing the Act, has applied the same factors to determine whether a violation by a state or federal employee warrants removal. Pet. App. A17.

ponent of the Due Process Clause by imposing differential sanctions on state and federal employees who violate the Act. Pet. App. A15-A20. It was true, the court explained, that the minimum sanction available under the Act for state employees was removal, whereas there were lesser sanctions available for federal employees. But that did not amount to discrimination against state employees, because neither a federal employee nor a state employee will be removed from his position unless the misconduct meets a particular standard of culpability, and that standard is identical for both state and federal employees. *Id.* at A17. Consequently, the primary difference between the treatment of state and federal employees under the Act identified by petitioner was that, if a state employee's misconduct does not warrant removal, no sanction at all may be imposed; in contrast, if a federal employee's misconduct does not warrant removal, lesser sanctions still must be imposed. *Id.* at A17-A18.[4]

That difference—the fact that misconduct by state employees that does not warrant removal goes unpunished, whereas identical conduct by federal employees may result in punishments other than removal—and the other differences in the penalty provisions, the

[4] The court also noted that since the Board found petitioner's willful violation warranted removal, the penalty would have been the same even if he had been a federal employee. Pet. App. A18. The court further noted that "it was for this reason" that the district court found that petitioner did not have standing to assert an equal protection challenge. *Id.* at A18 n.9. The court concluded: "While we agree that [petitioner] could have not have been adversely affected by the omission of suspensions from the statutory penalties available for violations by covered state employees, we simply conclude that he has failed to demonstrate he was deprived of equal protection." *Ibid.*

court of appeals concluded, survive rational basis scrutiny. Pet. App. A18-A19. The Hatch Act, the court of appeals explained, applies to a broader range of political activities for covered federal employees than for covered state employees. *Id.* at A18. Moreover, the federal government's interest as an employer, in promoting government effectiveness and fairness, deterring improper political influence or the appearance of political influence, and in awarding merit rather than political performance, differs from its interest, as a provider of funds to States, in removing partisan political influence from the administration of those federal funds. *Id.* at A19. The different considerations, the court of appeals concluded, "could provide a rational basis for the different statutory penalty provisions for federal employees and covered state and local agency employees who violate the Hatch Act." *Ibid.* The court of appeals also rejected petitioner's claim that the MSPB applied the Hatch Act more harshly against state employees than federal employees, concluding that the case-specific nature of penalty determinations provided a reasonable basis for the different outcomes in individual cases. *Id.* at A20.[5]

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[5] The court rejected petitioner's "subjective compilation" of Board decisions since 1994. Pet. App. A20. While petitioner had asserted that 21 of 30 state or local employees were removed from their positions as a result of the Board's decisions, and only three of 22 federal employees were removed for the same violations, the court concluded that most of the cases involving federal employees were not comparable to petitioner's case because they involved non-final decisions, involved conduct not prohibited for covered state employees, or were settled by agreement. *Ibid.* Only seven of the 22 cases actually decided by the Board involved federal employees who engaged in partisan and fund raising activities that were also prohibited for state employees. *Ibid.* Of those seven, four employees were suspended and three were removed. *Ibid.*

Finally, the court rejected petitioner's argument that employees on a mandatory unpaid leave of absence under Michigan law must be excepted from the coverage of the Hatch Act. Pet. App. A11-A12. Following the Eighth Circuit's decision in *Minnesota Department of Jobs & Training* v. *MSPB*, 875 F.2d 179, 183 (1989), the court of appeals concluded that the Hatch Act applies without regard to an employee's leave status. Pet. App. A12. Quoting the Eighth Circuit's decision, it explained:

> [T]he legislative history of the provisions of the Act makes it unmistakably clear that covered state employees are subject to the prohibitions of the Act regardless of leave status. During hearings on a proposal to extend the Hatch Act to state and local government employees, Congress specifically considered and rejected a provision which would have exempted from the Hatch Act's prohibitions those candidates who had taken a leave of absence without pay. 86 Cong. Rec. 2872-75 (1940).

Ibid. (quoting 875 F.2d at 183).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, it does not warrant further review.

1. Petitioner first argues that the Hatch Political Activity Act (Hatch Act), 5 U.S.C. 1501-1508, 7321-7326

The three federal employees who were removed were similarly situated to petitioner in that they were also found to have deliberately violated the prohibitions on partisan candidacy. *Ibid.* Accordingly, the court rejected petitioner's differential treatment argument as meritless. *Ibid.*

(1994 & Supp. III 1997), which prohibits certain political activities by covered federal employees and covered state employees working in federally funded programs, violates the equal protection component of the Due Process Clause of the Fifth Amendment because it provides different penalties for state and federal employees who commit violations. Pet. 12-14, 18-20. But this case does not present that question; petitioner lacks standing to raise it; and the contention lacks merit in any event.

a. Petitioner's primary complaint seems to be that the Hatch Act provides only one remedy, removal from office, for state employees who violate the Act, while federal employees may be subject to a range of remedies. See Pet. 12. The Hatch Act, however, imposes a mandatory sanction of removal for federal employees and state employees alike *whenever* those employees commit a violation that, like petitioner's, is sufficiently serious to warrant removal.[6] And, as the court of appeals observed, Pet. App. A17, the MSPB employs the same test to determine whether a Hatch Act violation warrants removal whether the case involves a federal or state employee—it asks whether the violation was serious and occurred under circumstances demonstrating a deliberate disregard of the law,

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[6] In particular, a federal employee who violates the Act must "be removed from his position" unless "the [MSPB] finds by unanimous vote that the violation does not warrant removal." 5 U.S.C. 7326. Similarly, where a state employee violates the Act, the MSPB must "determine whether the violation warrants the removal of the officer or employee." 5 U.S.C. 1505(2). Where the MSPB determines that removal is warranted, the state employer must either dismiss the employee or forgo an amount of otherwise available federal funds equal to two times the employee's annual pay. 5 U.S.C. 1506.

considering all the aggravating and mitigating factors. Compare *Special Counsel* v. *Lee*, 58 M.S.P.B. 81, 91 (1993) (construing Section 7326, the provision governing removal of federal employees), with *Special Counsel* v. *Purnell*, 37 M.S.P.B. 184, 200 (1988) (construing Section 1505, the provision governing removal of state employees), aff'd *sub nom. Fela* v. *MSPB*, 730 F. Supp. 779 (N.D. Ohio 1989).

Because the Board found that petitioner's violation here was willful and aggravated—he was repeatedly warned that his conduct would violate the Hatch Act and persisted nonetheless—the sanction of removal would have been imposed (and would have been mandatory) even if petitioner had been a federal employee. Pet. App. A18; see also *id.* at A32 ("Because the Board determined that [petitioner's] violation warranted removal, it could not have imposed any lesser penalty even if [petitioner] had been a federal employee."). Consequently, petitioner was not "adversely affected by the omission of suspensions" and lesser penalties "from the statutory penalties available for violations by covered state employees." *Id.* at A18 n.9. Simply put, if the same penalty provisions applicable to federal employees were made applicable to state employees, petitioner still would have been ineligible for any of the lesser penalties, and removal still would have been mandatory. *Ibid.*

Because petitioner was not treated differently from a similarly situated federal employee, this case does not present the question whether providing different penalties for state and federal employees who violate the Hatch Act is inconsistent with equal protection. For the same reason, petitioner lacks standing to raise the issue. Petitioner cannot show that any differences in the Hatch Act's penalty provisions caused him to

suffer an injury in fact, or that a favorable decision on his challenge to the alleged differences would redress his injury. He thus cannot meet "the irreducible constitutional minimum" requirements necessary to establish "standing" to raise his equal protection claim. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). It is precisely such a challenge that petitioner seeks to raise here. Pet. App. A33.[7]

b. Petitioner's equal protection claim is, in any event, without merit. As the district court pointed out, Pet. App. A32, the Hatch Act in many respects provides for more lenient treatment of state employees. A

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[7] Nor can petitioner argue that he may be subjected to differential treatment in the future. To the contrary, because petitioner will not be subjected to any sanctions unless he violates the Hatch Act again, and he nowhere indicates that he intends to do so, any claim based on the speculative possibility of a future application is too remote to be ripe. Cf. *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (mere passage of statute does not give complainant a ripe claim absent agency action "applying the regulation to him"); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review [absent] some concrete action applying the [challenged provision] to the claimant's situation in a fashion that harms or threatens to harm him."); *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983) (individual who cannot show he is likely to be a victim of the allegedly unconstitutional policy lacks standing to sue for injunctive relief). Likewise, petitioner's challenge cannot be justified under a First Amendment overbreadth theory. Petitioner challenges only the differences in the *penalties* applicable to otherwise properly proscribed conduct. As a result, petitioner cannot argue that the distinctions he seeks to challenge chill protected conduct.

federal employee who violates the Hatch Act *must* be removed from his position unless the MSPB "finds *by unanimous vote* that the violation does not warrant removal." 5 U.S.C. 7326 (emphasis added). In contrast, a state employee who violates the Act can escape removal if a *simple majority* of the MSPB agrees that the violation does not warrant removal; there is no unanimity requirement for state employees. Moreover, even if the MSPB concludes that removal is warranted for a state employee, the state agency can decline to remove the employee if it is willing to forgo federal funds equal to two times the employee's annual pay. 5 U.S.C. 1504-1506. Federal employees must be removed as a matter of law. Finally, even where removal of a federal employee is not warranted, the employee still must be subjected to some sanction for the violation; state employees whose violations are not sufficiently serious to warrant removal, in contrast, are subjected to no sanction at all. 5 U.S.C. 7326. Petitioner, a state employee, surely cannot be heard to claim that his rights are violated by more favorable treatment of state employees.

Any differences in the penalties applicable to state and federal employees, moreover, easily pass muster under the rational basis test, which petitioner concedes to be the applicable standard here. See Pet. 11-12.[8]

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[8] *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989), does not support petitioner's contention that a statutory distinction between federal and state employees would run afoul of the equal protection guarantee. In *Davis*, the Court invalidated a Michigan statute that exempted retirement benefits paid by the State and localities within the State, but not similar benefits paid by the federal government, from state income taxes. The court concluded that the Michigan statute violated the intergovernment tax immunity doctrine, and noted that traditional equal protection

The Hatch Act prohibits a broader range of activities for federal employees than for state employees.[9] Congress therefore may rationally have concluded that a broader range of penalties for federal employees was warranted as well. In addition, Congress's interest in regulating the conduct of state employees working in federally funded programs and its interest in regulating the activities of its own employees are somewhat different. Because a federal employee's conduct directly affects the effectiveness, efficiency, and public perception of the federal government, while a state employee's conduct does not, Congress could have reasonably determined that every Hatch Act violation by a federal employee must be punished in order to maintain the federal government's proper functioning and public confidence in it, but that only the most egregious violations by a state employee—those warranting removal—must be punished to ensure that the State administers federal funds in accordance with federal

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analysis was not applicable to the question before the Court. *Id.* at 816-817.

[9] The Hatch Act prohibits federal employees from: (1) using official authority or influence to affect an election; (2) knowingly soliciting, accepting, or receiving a political contribution, with certain exceptions; (3) running for partisan office, with certain exceptions; (4) knowingly soliciting or discouraging political participation by a person having dealings with the employee's office; and (5) engaging in political activity while on duty in a federal facility, in uniform, or using a government vehicle. 5 U.S.C. 7323(a), 7324(a), 7325 (1994 & Supp. III 1997). Certain federal employees may not take an active part in political management or political campaigns. 5 U.S.C. 7323(b) (1994 & Supp. III 1997). By contrast, the Hatch Act prohibits state employees only from: (1) using official authority or influence to affect an election; (2) knowingly soliciting, accepting, or receiving a political contribution; and (3) running for partisan political office. 5 U.S.C. 1502(a).

mandates. Cf. *United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947) (the Hatch Act reasonably limits the political activities of federal employees to promote federal government efficiency); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (Hatch Act as applied to state employees does not violate the Tenth Amendment because it was appropriate and plainly adapted to the federal exercise of spending power). Moreover, because the federal government, acting as employer, may directly impose removal or suspension upon its own employees, but relies on its spending power to influence the employment decisions of the States, Congress could reasonably have concluded that imposing finely tuned punishments for minor infractions committed by its own employees is appropriate, but that encouraging the States to impose such minor punishments through the spending power would prove too cumbersome to be efficacious and too burdensome to be worthwhile.

Finally, Congress also could reasonably have determined that the penalty imposed on petitioner, *i.e.*, removal and 18-month debarment or the forfeiture of significant federal funding, was necessary to ensure state employees' compliance with the Hatch Act. Petitioner's conduct demonstrates the reasonableness of that decision. He was perfectly willing to violate the Hatch Act when he believed that DSS's financial penalty, if it chose not to remove him, would amount to only two months of his salary—twice the amount of salary he received during the campaign, taking into account his leave of absence—an amount he believed the agency would willingly forfeit.[10]

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[10] Petitioner also asserts (Pet. 25-30) that the MSPB's decision in *Special Counsel* v. *DeMeo*, 77 M.S.P.B. 158 (1997), appeal

c. Alternatively, petitioner appears to argue that the MSPB has applied the Hatch Act in a fashion that discriminates against state employees. In particular, petitioner argues that the MSPB has ordered harsher

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pending, No. 98-3132 (filed Fed. Cir. Jan. 26, 1998), further supports his equal protection claim. In *DeMeo*, the MSPB held that the Hatch Act does not require federal employees who are dismissed for violating the Act to be debarred from re-employment following their removal. *Id.* at 174. In contrast, petitioner points out, the Act provides that, if a State attempts to evade the removal sanction by rehiring the employee to work on a federally funded program within 18 months of removal, it can lose funding in an amount equal to two years of the employee's salary. Petitioner, however, did not make that argument below—he cited *DeMeo* for the first time *after* argument in the court of appeals, and then only as a supplemental authority, even though *DeMeo* was decided before petitioner filed his opening brief—and *DeMeo* is hardly settled law. The case is currently under review, and the Director of the Office of Personnel Management has requested reconsideration of *DeMeo's* holding in *Special Counsel* v. *Malone*, 77 M.S.P.B. 477 (1998), which followed *DeMeo;* that request for reconsideration is still pending. *DeMeo*, in any event, does not support petitioner's equal protection claim. Even if the Hatch Act prevented States from circumventing the removal requirement by debarring state employee violators from federal-fund-related jobs for 18 months and did not impose a similar debarment period on federal employees, that difference would easily survive rational basis scrutiny. That federal agencies are permitted to rehire employees removed from service for violations of the Act does not mean they will choose to do so. And, given the legislative and other forms of oversight (*e.g.*, control through appropriations) to which federal agencies are subject, there is every reason to believe that they would not so undermine the Hatch Act's penalty provisions. Since Congress does not exercise similar oversight powers with respect to state agencies, Congress could rationally have concluded that an express debarment provision was necessary to prevent state agencies from circumventing removal requirements by rehiring removed employees.

penalties for state employees than it has for similarly situated federal employees. Pet. 15-16.

The court of appeals properly rejected that highly fact-intensive contention. See Pet. App. A20. The MSPB in fact has ordered removal in cases involving federal employees who, like petitioner, deliberately violated the prohibition on partisan candidacy. See, *e.g.*, *Special Counsel* v. *Dominguez*, 55 M.S.P.B. 652 (1992); *Special Counsel* v. *Carney*, 31 M.S.P.B. 32 (1986); *Special Counsel* v. *Johnson*, 26 M.S.P.B. 560 (1985). And the cases upon which petitioner relies to show that federal employees are treated more leniently are all distinguishable based on the employee's relative culpability, by the fact that the penalty was imposed by reason of a compromise in settlement, or because of other individualized considerations. See Pet. App. A20. Indeed, after examining the cases petitioner relied upon to support his claim of unequal treatment, the court of appeals found his claim to be without merit. *Ibid.*[11]

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[11] For example, petitioner argues that the Board ordered suspensions in three cases involving federal employees who deliberately violated the prohibition on partisan candidacy—*Special Counsel* v. *Baker*, 75 M.S.P.B. 155 (1997); *Special Counsel* v. *Campbell*, 58 M.S.P.B. 170 (1993), aff'd, 27 F.3d 1560 (Fed. Cir. 1994); and *Special Counsel* v. *Edenfield*, 52 M.S.P.B. 327 (1992). See Pet. 15, 24. In *Baker*, however, the action was dismissed, the Hatch Act complaint was not adjudicated, and no penalty issues were addressed. 75 M.S.P.B. at 156. In *Edenfield*, the Board adopted a settlement agreement in which OSC and the employee agreed to a 30-day suspension. 52 M.S.P.B. at 329. And in *Campbell*, the Board found that the employee's violation did not warrant removal even though OSC had warned him against running, because the employee's agency ethics officer had told him that his candidacy would *not* violate the Hatch Act. 58 M.S.P.B. at 182-183. Petitioner, in contrast, was told by *everyone* that he could not be a

2. Petitioner also claims that the Hatch Act violates due process as applied to Michigan state employees. Pet. 16-18. In particular, petitioner notes that Michigan law does not prohibit state employees from running for political office so long as they take an unpaid leave of absence during their candidacy. The Hatch Act, in contrast, provides no such exception for covered state employees working in federally funded programs, see 5 U.S.C. 1501(4), 1502(a)(3), and the legislative history demonstrates that Congress expressly considered, but rejected, exceptions for employees who take unpaid leave. As the only other court of appeals that has addressed this issue held, "it is clear from the statute and the legislative history that a covered state employee is prohibited from running for public office in a partisan election, even if on approved leave without pay." *Minnesota Dep't of Jobs & Training* v. *MSPB*, 875 F.2d 179, 183 (8th Cir. 1989) (en banc); see also *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 572-573 n.18 (1973).

In essence, petitioner argues that Michigan's civil service law, which permits employees to run for office while on an unpaid leave of absence, must supersede the Hatch Act with respect to covered state employees working on federally funded projects. But that turns the law of pre-emption on its head. So long as Congress legislates in areas within its constitutional powers—as it does when it attaches appropriate conditions to federal funding—federal law supersedes inconsistent state laws. *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). And, although petitioner asserts that such pre-emption in this context violates

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candidate without violating the Hatch Act, but he decided to become a candidate nonetheless.

due process, he cites no legal authority supporting that assertion.

3. Finally, petitioner argues (Pet. 22-23) that the court of appeals' decision to permit this case to be resolved through a motion to affirm conflicts with the Tenth Circuit's decision in *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560 (1994). That assertion is mistaken. In *Olenhouse*, the Tenth Circuit disallowed the use of summary judgment in administrative review proceedings, even when framed as a motion to affirm, on the theory that it invites the consideration of extra-record evidence and post-hoc rationalizations in violation of the standard of review set out in the Administrative Procedure Act. 42 F.3d at 1579-1580. Since *Olenhouse*, however, the Tenth Circuit has clarified that, even where the district court uses the label "summary judgment" to describe its decision, the district court's order will not be reversed for that reason if it applies the correct standard of review and does not entertain extra-record evidence or justifications. *Baca* v. *King*, 92 F.3d 1031, 1034 n.1 (1996).

In this case, the court of appeals found it unnecessary to decide whether to adopt the *Olenhouse* rule because the district court in fact had relied only on record evidence and had applied the correct standard of review. The Fifth Circuit likewise found it unnecessary to decide whether to follow *Olenhouse* where, as here, the district court grants an agency's motion to affirm after reviewing the administrative record under the appropriate standard. *Girling Health Care, Inc.* v. *Shalala*, 85 F.3d 211, 214 (1996). Because those decisions are consistent with *Olenhouse* and the Tenth Circuit's treatment of *Olenhouse* in *Baca*, they do not give

rise to a conflict in circuit authority warranting this Court's review.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Petitioner also claims that the district court should have held a hearing to determine whether the administrative record it was sent in fact was complete. Pet. 22. Petitioner, however, does not explain what was omitted from the record, how the omission prejudiced him, or why the omission could not have been corrected through a motion to supplement containing copies of the omitted administrative agency record materials. In any event, petitioner's claims concerning the state of the record transmitted to the district court are fact-bound and do not warrant this Court's review.